82-573

No. 82-

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ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., and its PRESIDENT, WILLIAM F. GIBSON, et al.,

Appellants,

—v.—

RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

October Term, 1982

No. 82-

South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc., and its President, William F. Gibson, et al.,

Appellants,

—v.—

Richard W. Riley,
Governor of the State of South Carolina, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT

The appellants, South Carolina State Conference of Branches of the NAACP, Inc. and its President, Wm F. Gibson, et al., appeal from a U.S. District Court for the District of South Carolina, Columbia Division denial of permanent-preliminary injunctive relief, dated June 2, 1982, which held Section 5 preclearance under 42 U.S.C. 1973 (c) non-applicable to a congressional district reapportionment plan adopted by the district court with minor modification after submission by the "covered jurisdiction" in whose legislature the plan had originated through formulation and passage by one legislative chamber.

Opinions Below

The order of the U.S. District Court for the District of South Carolina, Columbia Division, which appears in the appendix hereto, Appendix A, *infra*, is not reported. Related orders by that court, orders of May 7, 1982 and June 2, 1982, also appear in the appendix hereto, Appendix B, and Appendix C, *infra*. Neither is reported.

Jurisdiction

This suit was brought by the South Carolina State Conference of Branches of the NAACP, William F. Gibson, its President, and other named individuals seeking declaratory, injunctive, and other equitable relief pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 *et seq.*, as well as other state and federal statutory and constitutional provisions. The suit challenged Congressional districting in South Carolina.

On March 8-9, 1982, the three-judge court held that, due to demographical changes, the 1970 Congressional districting plan could not stand (See Appendix A, *infra*). The Court also approved a plan authored by the South Carolina House of Representatives and submitted by the leadership of the House of Representatives, one of the defendants. After minor modification as directed by the court, the House plan was approved and ordered into effect in the May 7, 1982 order (See Appendix C, *infra*).

On June 2, 1982, the three-judge court denied an application by appellants to enjoin implementation of the newly approved plan until it had met the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973 (c) (See Appendix A, *infra*).

On June 8, 1982, this court denied appellants' application for a stay and/or injunction which would have required preclearance prior to the implementation of the new plan (See Appendix D, *infra*).

A notice of appeal to this court was duly filed in the United States District Court for the District of South Carolina, Columbia Division on May 27, 1982 (See Appendix D, *infra*). This appeal is being docketed in this court in a timely fashion. The jurisdiction of this court is invoked under 42 U.S.C. 1973 (c) and 28 U.S.C. 1253.

Question Presented

Whether a congressional reapportionment plan developed, approved and submitted in litigation by only one, of two, legislative chambers of a "covered jurisdiction" *and* later court adopted, with only minor modification, is a legislatively drawn plan, thus subject to preclearance under Section 5 of the Voting Rights Act, or a court plan, thus exempt from Section 5 preclearance?

Statutory and Constitutional Provisions Involved

Section 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, §5, 79 Stat. 439, as amended by Pub. L. No. 91-285 §§2, 5 (June 22, 1970) 84 Stat. 314, 315, as amended by Pub. L. No. 94-73, Title II §§204, 206, Title IV §§405 (August 6, 1975) 98 Stat. 402, 405 as amended, by Pub. L. No. 97-2-5 (June 29, 1982), 96 Stat. 131, 135 [codified at 42 U.S.C. §§1973 (c) (1970)]; U.S. CONST. amend. XIV and U.S. CONST. amend XV.

Statement of the Case

Appellants brought suit under the Voting Rights Act of 1965 as amended against the State of South Carolina and its officials for their purposeful failure to devise and implement a congressional reapportionment plan, which failure violates constitutional and statutory requirements for equitable districting and avoidance of disproportionately burdening the ability of blacks to participate on an equal basis in the electoral process. A copy of the Complaint is annexed hereto at Appendix H.

The three-judge District Court invited all parties to submit proposed congressional redistricting plans to the Court. The court heard only oral argument from all counsel in support of their various plans and respective legal positions.

The District Court in its Per Curiam Order filed on March 8, 1982, and entered on March 9, 1982, found an impermissibly high variation in the 1970 Congressional districting plan in light of the 1980 census. While discussing various plans submitted by the parties, the Court stated, in part, "(w)e have considered all of the suggested plans. *We have not attempted to develop one of our own.*" (emphasis added). A copy of the Court's order is annexed hereto at Appendix B.

The Court adopted a congressional plan drawn by the South Carolina House of Representative, but rejected by the South Carolina Senate. The Court expressed dissatisfaction with only one aspect of the plan, namely the precise location of the line dividing Berkeley County. The Court ordered the South Carolina House-drawn plan into effect, subject to the defendants' modification of the line dividing Berkeley County.

Appellants became aware through media reports of respondents' intent to implement the Congressional redistricting plan initially approved by the District Court on March 9, 1982, and finally approved on May 7, 1982.

By letter of April 12, 1982, appellants advised appellees of *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), and of the requirements of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973(c) which, appellants stated, require Section 5 preclearance of court-ordered legislatively-drawn plans.

Appellants filed with the District Court an application for Order to Show Cause and Motion for Injunction and entry of an order requiring appellees to show cause why they should not be enjoined from proceeding with implementation of the Congressional redistricting plan as ordered into effect by the Court because of the appellees' refusal or failure to submit the plan to the United States Attorney General for Section 5 preclearance.

The District Court denied Appellants' application on June 2, 1982, stating that the plan is not a legislatively enacted plan and is not subject to preclearance requirements of Section 5.

On June 8, 1982, this Court denied an application by appellants to enjoin implementation of the adopted plan until such time as it was subject to preclearance.

The Question Is Substantial

This jurisdictional statement raises the substantial question of whether the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 (c) applies to a congressional reapportionment plan that was (1) conceived in legislative deliberations but passed by only one of the

two chambers in a "covered jurisdiction" and was then (2) adopted by a federal court with only minor court-ordered modifications. Appellants contend that neither the text of Section 5, nor the prior mandate of this court that these preclearance provisions be liberally construed, supply the answer to this question directly. *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981); *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 38 (1978).

The substantiality of the instant question arises from the direct threat posed to Section 5's future by the lower court's order. This threat exists on two levels: First, the failure to require preclearance here radically contradicts the most basic goals and policies of Section 5. Second, the lower court's decision runs so blatantly against the currents of recent case law that to let it stand would invite anarchy in the field of voting rights law.

Section 5 aims to provide realistic safeguards for minority citizens' rights and does not simply chart out a procedural detour. *Upham* v. *Seamon*, —— U.S. ——, 50 U.S. L.W. 3839 (April 20, 1982). Section 5's requirements are neither applied to, nor administered by, random groups. Rather, Congress designed Section 5 so that preclearance would check the conduct of a particular power group—state and local legislators—once factual circumstances had evidenced a presumptive pattern of voting rights infringement. Congress, moreover, designed Section 5 so that those entrusted with screening out voting rights violations, the U.S. Attorney General, would develop the expertise to discern and expose even the most subtle electoral discrimination. 42 U.S.C. § 1973 *et seq.*; *McDaniel*, *supra* 452 U.S. at 150-1.

Finally, these safeguards draw their strength not only from Section 5's historically-informed checking and grant-

ing of power and authority, but also from the unique substantive standards the Voting Rights Act employs. As recently as April, 1982 this Court has made clear the especially stringent substantive standards brought into play by Section 5. *Upham* v. *Seamon, supra; U.S.* v. *Board of Supervisors of Warren County,* 423 U.S. 642 (*Per Curiam*) (1978).

Section 5 has substantially achieved the intended purpose of safeguarding minority citizen voting rights where its provisions have been applied. *McDaniel, Supra* 452 U.S. at 151 n.32. Appellants believe the Section 5 preclearance provisions were capable of achieving their intended purpose in the instant South Carolina context, but for the lower court's erroneous application of the standards articulated by this court. Instead, a legislative plan too partisan to even garner sufficient support for full legislative enactment was let stand. Thus, while Section 5 would have permitted experts from the Justice Department to examine the reappointment plan for adverse racial infection, the lower court did not permit it to do so. The good faith examination of the court is no substitute for the more rigorous review intended by Section 5 through the U.S. Attorney General's acquired expertise in this area. 429 U.S. at 643-644.

A brief examination of applicable and controlling standards underscores the nature of the lower court's error and the importance of corrective action by this court.

McDaniel and other case law of this court defines the principles and precedent that govern preclearance application. Two basis complementary principles of Section 5 preclearance application emerge from this case law: First, all legislative reapportionment plans are subject to preclearance; Second, only court-drawn reapportionment plans are exempt from preclearance. A decision on *McDaniel,*

Supra application or non-application should satisfy both these principles. 452 U.S. 130. The lower court's order satisfies neither and leaves the case law of this court in shambles.

The legislative status of a reapportionment plan stems from its authorship by a legislative body not from its label, not from its reflection of legislative initiative or autonomy and not from its achieving fruition in the legislative process. This court has held, for instance, that a plan prepared by a legislative body acting under court direction is still a legislative plan. *Wise* v. *Lipscomb*, 437 U.S. 535 (1978).

In *McDaniel*, furthermore, this court held Section 5 fully applicable to a court-adopted plan that a legislative body originated not through its ordinary deliberative process but through an independent expert. 452 U.S. at 136. This court further held that the body's failure to adopt the plan prior to district court submission did not shield the plan from preclearance. *Id.*

Essentially, the legislative origin of the *McDaniel* plan endured. The plan's expression of the "policy choices of the elected representatives—no matter what constraints have limited (their) choices", controlled. 452 U.S. at 153.

Bewilderment must greet Section 5's non-application to a plan adopted virtually intact from a "covered jurisdiction's" submission of a reapportionment scheme prepared and approved by one, of two, state legislative chambers acting without court direction. Why should a legislatively originated plan that fails to survive the full legislative gauntlet be shielded from preclearance where the plan is submitted by the authoring legislative chamber, a "covered jurisdiction" defendant, and adopted by a district court virtually *in toto*? Can a politically stunted reapportionment plan be cast as non-legislative, despite its exclusively

legislative parentage? Where in this Court's prior decisions did the lower court ground its belief that the legislative status of a reapportionment plan was anything less than indelible?

Concluding whether or not a plan had legislative status impliedly involves a determination of whether it had the alternative, preclearance-immune, status of a court plan. This court in *McDaniel* explicitly precluded court status for those plans submitted by the "elected representatives" of a "covered jurisdiction". *Id.*[1] Furthermore, in *McDaniel* and other decisions, this court has rejected conferring court status on a reapportionment plan based merely on court adoption. *McDaniel, supra,* 452 U.S. 130; *Wise, supra,* 437 U.S. 535.

The lower court's treatment of the instant reapportionment plan as a court plan, therefore, creates additional inconsistencies with controlling law and threatens the very integrity of the Voting Rights Act.

If the lower court's order is to become law, it will substantially undercut Section 5's preclearance safeguard. It will, moreover, send a very significant and mischievous message to legislatures in "covered jurisdictions." Committees and chambers will be tempted to preserve reapportionment plans in legislative limbo assuring, thereby, their non-legislative status and saving them from subjection to full legislative debate and the rigors of Section 5.

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[1] In dictum, at least, this court went even further to suggest that only a plan actually fashioned by the court, and therefore, no plan submitted by any litigant, was a court plan for the purposes of preclearance—exemption. Appellants do not ask this court to address this broader question on the facts of the case at bar. *McDaniel, supra,* 452 U.S. at 148-149.

CONCLUSION

For these reasons, the court should note probable jurisdiction for this appeal.

Respectfully submitted,

/s/ THOMAS I. ATKINS

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APPENDIX A

March 8-9, 1982 Order of District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 81-2287-6

South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc., and William F. Gibson, its President, Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden,

Plaintiffs,

versus

Honorable Richard D. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina, Presiding Officer and President of the Senate, L. Marion Gressette, President Pro-Tempore of the Senate and Chairman of the Senate Judiciary Committee, Raymond Schwartz, Jr., Speaker of the House, Robert J. Sheheen, Chairman of the House Judiciary Committee of the State of South Carolina, and James Ellisor, Elections Commissioner for the State of South Carolina,

Defendants.

Appendix A—March 8-9, 1982 Order of District Court

Civil Action No. 81-2493-0

Richard Patrick Owens, a resident of the County of Hampton, and Henry D. Prickett, a resident of the County of Greenville,

Plaintiffs,

versus

Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina and Presiding Officer of the Senate, Ramon Schwartz, Jr., Speaker of the South Carolina House of Representatives, and James B. Ellisor, Executive Director of the Elections Commission for the State of South Carolina,

Defendants.

Argued February 11, 1982 Decided

Before HAYNSWORTH, *Senior Circuit Judge,* RUSSELL, *Circuit Judge,* and SIMONS, *Chief Judge for the District of South Carolina*

PER CURIAM:

For many months the two houses of the South Carolina legislature wrestled with the problem of congressional redistricting on the basis of the 1980 census data. Plans acceptable to one of the houses, however, were not acceptable to the other. Conceiving themselves to be hopelessly deadlocked, they abandoned the attempt to reach agreement with the expectation that this court would adopt a redistricting plan for the State.

Appendix A—March 8-9, 1982 Order of District Court

I.

No one contends the 1970 congressional districting plan may be continued. Between the 1970 and 1980 censuses, there were population shifts and disparate growth rates so that the 1970 plan would have impermissibly high variances on the basis of the 1980 census data. All parties before the court are thus agreed that this court must adopt a new congressional redistricting plan for South Carolina. That we will do, but with the distinct qualification that, if a different congressional districting plan is lawfully enacted, it may be placed in effect in lieu of the court's plan, provided it meets federal constitutional requirements and is in place in time to permit orderly functioning of the electoral process in the first election to which it is to be applied.

II.

Two separate cases have been consolidated for hearing and disposition. One of them was brought by the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People and some of its officials. It was brought against the Governor, the Lieutenant Governor, the chairman of the Senate Judiciary Committee and the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the Chairman of the Judiciary Committee of the House, and the Executive Director of the Elections Commission of the State of South Carolina. The other was brought by Richard Patrick Owens and Henry D. Prickett, in their capacities as individual voters, against some of the same defendants.[1]

[1] A number of defendants have filed motions to dismiss. We do not consider those motions of the legislative defendants, for no relief will be granted as to them. The motion of the Executive

The parties have presented a number of plans for consideration by the court. The NAACP plaintiffs have submitted three plans, though they principally urge adoption of one of two plans which would create a Sixth District with a majority of black residents. The Owens plaintiffs have submitted the "Eagle Plan," so called because its Second District resembles an eagle with wings widespread and its tail, neck and head outstretched. They also have submitted a modified Eagle Plan, with a very low variance achieved by crossing county lines to pick up or drop pockets of people. The defendants from the House of Representatives have submitted a plan enacted by the House, and they urge its adoption by the court. The Senate defendants have laid upon the table a number of plans, only one of which, the 3.44% plan which is discussed later, was ever enacted by either house. They do not urge us to adopt any one of them, but invite our attention to them solely for the purpose of showing that district boundaries may be drawn to produce tolerable variances without violating county lines.

III.

We take our direction from a set of principles which should guide us.

A. First, and most important, is the requirement of *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8. We will

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Director of the Elections Commission is denied, for it is he who will have primary responsibility for the implementation and execution of our order. Our order will also run against the Governor and Lieutenant Governor insofar as they may be involved in the execution of the election laws, including compliance with our direction.

thus confine our consideration to plans with low population variances. There are several plans before us with maximum variances of less than 1%, still more with maximum variances of less than 2%. The higher the variance, of course, the stronger must be the reasons for departure from near perfect equality.

B. The State has a substantial interest in the preservation of county lines in the congressional redistricting process, as long as that can be done without violation of the principle of *Wesberry* v. *Sanders* and consistently with other State interests. *See White* v. *Weiser*, 412 U.S. 783, 795 (1973). Indeed, the Senate defendants insist that the South Carolina Constitution requires of the legislature strict adherence to county lines in drawing congressional districts.

Article VII, § 13 of the South Carolina Constitution of 1895 provides:

> The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts . . . as it may deem wise and proper . . . .

The provision is permissive, not mandatory, though the Senate defendants would find in it an implicit prohibition against subdivision of any county. With respect to that, one may say that there should be little doubt that the members of the constitutional convention of 1895 did not foresee the Supreme Court's holding in *Wesberry* v. *Sanders* and the problems that would be engendered by required decennial redistricting. Probably no one thought of the possibility of a division of a county between two congressional districts, and, if one had thought of it, the

answer probably would have been that it should not be done unless there was good reason for it.

This is a question, however, which we may not address authoritatively. Only the Supreme Court of South Carolina may do that. Clearly, however, South Carolina's constitutional provision addresses the powers of the legislature. It has nothing to do with the power of this court, and it is relevant to our decision only insofar as it may be read as an expression of a general state policy against dividing counties in the course of congressional redistricting.

We recognize, however, that there is a substantial state policy favoring drawing congressional districts along county boundaries. This is so because the residents of a county have a community of interest. They are accustomed to voting together for county officials. There is much administrative convenience in drawing district lines along county lines, and it facilitates the process of organizing constituencies and campaigning for the support of constituents.

C. Any new plan should alter the old only insofar as necessary to obtain an acceptable result. Incumbents know their constituents in the old districts, and many of those constituents will know their congressman as "my congressman." Many of the constituents would have been served by the congressman in ways calculated to obtain and enhance loyal support. Such voters ought not to be deprived of the opportunity to vote for a candidate that has served them well in the past and to enjoy his continued representation of them. Supporters and opponents, alike, have a basis for judging him. This consideration, of course, must give way to the requirements of *Wesberry* v. *Sanders*, but great alterations of the old districts should not

be undertaken if lesser change will achieve the desired result. *See White* v. *Weiser, supra,* at 797.

D. Certain adjoining counties have a special community of interest, for metropolitan areas overflow county boundaries. This is true of Greenville and Spartanburg and of Richland and Lexington, for metropolitan Columbia's growth in Lexington County has been large and vigorous. It is also true of Charleston, Berkeley and Dorchester. Metropolitan Charleston's area includes portions of both Berkeley and Dorchester, and the three counties together support and run a joint Chamber of Commerce. *See David* v. *Cahill,* 342 F. Supp. 463, 469 (D.N.J. 1972).

E. The districts should be as compact as reasonably possible. *See Dunnell* v. *Austin,* 344 F. Supp. 210, 215 (E.D. Mich. 1972).

F. We must be careful that district boundaries are not gerrymandered to dilute the voting strength of minorities. *See Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). A court should approach the problem with racial neutrality but with care to be assured that no unfairness to any race is inadvertently perpetrated.

G. Finally, we must give some weight to the fact that the plan adopted by the House has substantial political support. No other plan with an acceptable variance has been adopted by either house or enjoys any ascertainable degree of political acceptance.

Perhaps no plan may fully serve all of these purposes, but each should be judged with these considerations in mind.

IV.

The House plan achieves a thoroughly acceptable maximum variance of 0.28%.

The changes to achieve that result involve only six of the forty-six counties. Barnwell and Allendale are moved from the Second District to the Third. Newberry County is moved from the Third District to the Fifth, while Union County is moved from the Fifth to the Fourth, and Lee County is moved from the Sixth to the Fifth.

Berkeley County is divided. Most of the populous Goose Creek-Hanahan Division of Berkelely County, a part of metropolitan Charleston in which approximately 54,000 people reside, is placed with Charleston in the First District, while the much larger, though more rural area of the county, containing about 40,000 people, is placed in the Sixth District.

The House plan substantially preserves intact the metropolitan centers which are thought to be best left together. Greenville and Spartanburg remain in the Fourth, Richland and Lexington remain in the Second, while Charleston and Dorchester, and most of that portion of Berkeley County which may be regarded as part of the Charleston metropolitan area, remain in the First.

The House plan does not reduce the black population of any district by as much as 1%. That population is reduced by .9% in the First District, by .8% in the Second, and by .4% in the Sixth, but there are reciprocal increases of 1% in the Third District, of .7% in the Fourth, and of .2% in the Fifth.

The only discernible objection to the House plan is the division of Berkeley County.

One of the plans submitted on behalf of the Senate defendants, though its adoption is not urged, has a maximum variance of .73%, substantially higher than the .28% of the House plan. The districts are organized entirely along county lines, but to achieve that result eighteen counties are moved from one district to another. Greenville and Spartanburg are divided, and Berkeley County is entirely separated from Charleston and placed in the Sixth District, although it is substantially surrounded by a revised First District.

Another plan submitted by counsel for the Senate defendants would achieve a maximum variance of .98%. The division is entirely along county lines, but Richland and Lexington are separated, as are Charleston and Dorchester. The Second District, into which the Fifth deeply penetrates, could hardly be called compact. Thirteen counties would be transferred out of their present districts.

Counsel for the Senate defendans have submitted other plans with maximum variances ranging from 1.48% to 2.37%. The boundaries are entirely along county lines, but they achieve their results by radical rearrangement of the counties. In the 1.48% plan, for instance, the First District gives up Hampton, Jasper, Beaufort, Colleton and Dorchester but picks up Georgetown and Horry Counties. The Second District would lose Barnwell, Allendale, Bamberg, Orangeburg, Richland and Calhoun Counties, but would acquire Saluda, Newberry, Laurens, Abbeville, Anderson, Oconee and Pickens Counties. The Third District would lose Oconee, Pickens, Anderson, Abbeville, Saluda and Newberry Counties, but would pick up Barnwell, Allendale, Bamberg, Orangeburg, Calhoun, Hampton, Colleton, Jasper, Dorchester and Beaufort Counties. The Fifth District would lose Union County to the Fourth, and Chester-

field, Kershaw and Sumter to the Sixth, while picking up Richland County. The Sixth District would lose Horry and Georgetown to the First, while picking up Sumter, Kershaw and Chesterfield.

As we have indicated, neither the Senate itself nor either of the Senate defendants has endorsed any of the plans submitted to us by their lawyers. They are simply illustrations of the fact that the district lines can be drawn with strict adherence to county lines, but they are also demonstrations of the fact that the cost is very large, since they bear little resemblance to the present districts. In addition, the population variances in all of the plans exceed the population variance in the House plan.

The last plan actually considered favorably by the Senate has a maximum variance of 3.44%, and it has a Third District extending from the mountain ridges, along which the border with North Carolina runs, to the Atlantic Ocean.

The Eagle Plan has a maximum variance of 1.55%, and separates Richland and Lexington Counties and Charleston and Dorch[illegible] Counties. Moreover, it would transfer ten counties from one district to another. The residencies of two incumbents would be placed in the same district.

At oral argument, counsel for the Owens plaintiffs submitted a modified Eagle Plan. It is identical to the first except that in four instances it crosses county lines to pick up small groups of persons and move them from one district to another. By such moves it achieves a maximum variance of only 0.0656%, but the separation of Richland and Lexington Counties and Charleston and Dorchester Counties remain. Moreover, crossing county lines in four instances for the purpose of transferring relatively small

groups of people from one district to another seems unacceptable.

The NAACP plaintiffs have tendered three plans with maximum variances of 0.66%, 1.50% and 2.61%. The rearrangement of the counties is radical, many counties are split, and the population variances are higher than the one in the House plan. In the 0.66% plan, Colleton, Dorchester, Berkeley, Williamsburg, Marion, Darlington, Richland, Anderson, Florence, Orangeburg and York are each divided between two districts. The 1.50% plan divides Anderson, York, Richland, Darlington, Florence, Berkeley, Dorchester and Colleton Counties.

V.

From these brief descriptions of suggested plans, it should be apparent that the most acceptable one is the House 0.28% plan. It more satisfactorily meets every consideration identified as relevant to our decision, except for the division of Berkeley County. A division of one county is not an inconsiderable objection, but it seems to us far less weighty than the extensive and radical rearrangement of the counties or the great increase in the maximum variances that strict adherence to the boundaries of all forty-six counties requires. Moreover, that division is not simply a move to pick up or exclude people, but is drawn roughly along the borders of metropolitan Charleston with which the people in the lower part of Berkeley County do have a community of interest.

We are not entirely satisfied, however, with the precise location of the line dividing Berkeley County. In part it runs through a Naval facility upon which people are housed, and the exact line through it is yet to be located upon the basis of a population count yet to be made. To

the extent that it is feasible, the line there and elsewhere should run along precinct lines so that all of the residents of each precinct may use one ballot for congressional races. Counsel will be requested to make further inquiry as to that, and to report back to the Court.

We have considered all of the suggested plans. We have not attempted to develop one of our own. The likelihood that we could produce one better than the House 0.28% plan is so slight an attempt is unwarranted. The time for campaigning is almost at hand; an effort to develop a court alternative would take weeks if not months. As soon as possible candidates should know the boundaries of their districts, and the voters their choice of candidates.

VI.

An order will be entered requiring the House 0.28% plan to be placed in effect, subject to modification of the line dividing Berkeley County. That plan will remain in effect for all congressional elections through 1990, unless South Carolina enacts its own plan which will meet federal constitutional requirements. To that end, the South Carolina legislature is free to proceed at any time, and to place in effect a lawfully enacted plan, provided only that the plan is in place a sufficient time before the first election to which it is to be applied to permit the orderly functioning of the electoral process.

TRUE COPY:
Test:
John W. Williams, Clerk
By JANE ADAMS
Deputy Clerk

APPENDIX B

May 7, 1982 Order of the District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 81-2287-6

South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc., and William F. Gibson, its President, Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden,

Plaintiffs,

versus

Honorable Richard D. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina, Presiding Officer and President of the Senate, L. Marion Gressette, President Pro-Tempore of the Senate and Chairman of the Senate Judiciary Committee, Raymond Schwartz, Jr., Speaker of the House, Robert J. Sheheen, Chairman of the House Judiciary Committee of the State of South Carolina, and James Ellisor, Elections Commissioner for the State of South Carolina,

Defendants.

Appendix B—May 7, 1982 Order of the District Court

Civil Action No. 81-2493-0

Richard Patrick Owens, a resident of the County of Hampton, and Henry D. Prickett, a resident of the County of Greenville,

Plaintiffs,

versus

Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina and Presiding Officer of the Senate, Ramon Schwartz, Jr., Speaker of the South Carolina House of Representatives, and James B. Ellisor, Executive Director of the Elections Commission for the State of South Carolina,

Defendants.

In our opinion filed March 8, 1982, we directed the parties and counsel to redraw the line dividing Berkeley County so as to make it run along precinct lines. Counsel for the defendants, other than the Senate defendants, have submitted a plan which draws a new line without dividing precincts. It affects the numbers slightly, for it places 432 more people in the First District than the previously drawn line, and, of course, 432 fewer people in the Sixth District. This transfer increases the total variance slightly from 0.28 to 0.295. However, it is easily administered and every voter in each precinct may vote in the same congressional election.

The new line places Berkeley County voting precincts 7, 11, 26, 28, 29 and 30 in the First District, while all the remaining Berkeley County precincts are placed in the Sixth District.

Maps showing the detail of the new Berkeley County division have been filed with the Clerk.

At a hearing held in Columbia, South Carolina on April 28, 1982, at which all counsel were present, there was no objection to the new line dividing Berkeley County.

The Court approves the new line.

With that modification of the earlier decision, IT IS NOW ORDERED that the Court adopted 0.295 plan be placed into effect for the congressional elections to be held in 1982 and in all ensuing congressional elections through the year 1990, unless South Carolina shall adopt a different congressional districting plan meeting the requirements of the Constitution of the United States. In the event of the adoption of a different legislative districting plan, it may be placed into effect at such time as may be specified in the statute.

/s/ CLEMENT F. HAYNSWORTH, JR.
Clement F. Haynsworth, Jr.
Senior United States Circuit Judge

/s/ DONALD RUSSELL
Donald Russell
United States Circuit Judge

/s/ CHARLES E. SIMONS, JR.
Charles E. Simons, Jr.
Chief Judge, United States District Court

April 30, 1982

True Copy:
Test:

JOHN W. WILLIAMS, Clerk
By C. RILEY
Deputy Clerk

APPENDIX C

June 2, 1982 Order of the District Court Denying Appellant's Application for Order to Show Cause and Motion for Injunction

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civ. Action No. 81-2287-6

South Carolina State Conference of Branches of The National Association for the Advancement of Colored People, Inc. and its President, William F. Gibson, et al.,

Plaintiffs,

vs.

Richard W. Riley, Governor of the State of South Carolina, et al.,

Defendants.

ORDER

We have before us an application by the plaintiffs for a preliminary and permanent injunction against the implementation by the defendants of our Order of May 7, 1982, directing the implementation of a new congressional redistricting plan. The motion is based upon the contention that Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c), is applicable and prevents implementation of the court-ordered plan without preclearance in accordance with Section 5. The papers were

Appendix C—June 2, 1982 Order of the District Court Denying Appellant's Application for Order to Show Cause and Motion for Injunction

filed on May 31, 1982, close to the eve of the primary election scheduled to be held on June 8, 1982.

A legislatively-adopted congressional redistricting plan is subject to the preclearance requirements of Section 5, and a federal district court is without jurisdiction to order its implementation without such preclearance. *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981). On the other hand, a court-directed plan, which has not been adopted by the legislature, is not subject to the preclearance requirements of Section 5. *Connor* v. *Johnson*, 402 U.S. 690 (1971). The plan imposed by the court was never adopted by the South Carolina Legislature.

Over a period of many months South Carolina's Legislature considered many plans for congressional redistricting based upon 1980 census data. There developed what appeared to be irreconcilable differences between the Senate and the House of Representatives with the result that legislative efforts to enact a redistricting plan acceptable to both Houses were terminated.

With a minor modification, the plan imposed by this court was based upon a plan that had been approved by the House of Representaives. It had never been approved by the Senate. Indeed, in this court, counsel for senatorial defendants strongly objected to the court's adoption of that plan primarily upon the ground of its division of Berkeley County.

That plan was only one of many considered by the court. It was adopted by this court only because it appeared to be the most reasonable and most acceptable alternative open to the court. The reasons for our preference of that plan were stated in our earlier opinion.

Appendix C—June 2, 1982 Order of the District Court Denying Appellant's Application for Order to Show Cause and Motion for Injunction

Since the plan imposed by the court is not a legislatively enacted plan, it is not subject to the preclearance requirements of Section 5. Under our order the legislature is free to replace the court-ordered redistricting plan with a legislatively devised congressional redistricting plan, subject only to the requirements of Section 5.

Since Section 5 of the Voting Rights Act is inapplicable, the request for an injunction against implementation of the court-ordered plan is denied.

With the concurrence of Judge Russell and Judge Simons.

s/ CLEMENT F. HAYNSWORTH, JR.
United States Senior Circuit Judge

June 2, 1982

TRUE COPY
TEST:

JOHN W. WILLIAMS, Clerk
By: EDITH W. THOMAS
Deputy Clerk

APPENDIX D

Appellants' Notice of Appeal

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA 29202

June 3, 1982

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: S. C. State Conference of Branches of the NAACP, Inc., et al. vs. Honorable Richard D. Riley, Governor of the State of S. C., et al. (Civil Action Number 81-2287-6)

Richard Patrick Owens, et al. vs. Richard W. Riley, Governor of the State of S. C., et al. (Civil Action Number 81-2493-6)

Dear Mr. Stevas:

We filed on May 27, 1982, the plaintiffs' Notice of Appeal in the above captioned cases. Forwarded herewith is a certified copy of same. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

JOHN W. WILLIAMS, CLERK

/s/ MARY LYNN PHIPPS
By: Mary Lynn Phipps
Deputy Clerk

Appendix D—Appellants' Notice of Appeal

cc: with copy of Notice of Appeal
Thomas I. Atkins, Esquire
Margrett Ford, Attorney at Law
Michael F. Talley, Esquire
Elmer W. Hatcher, Jr., Esquire
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Randall T. Bell, Esquire
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Appendix D—Appellants' Notice of Appeal

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 81-2287-6

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., and its PRESIDENT, WILLIAM F. GIBSON, et al.,

Plaintiffs,

v.

RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, et al.,

Defendants,

and

RICHARD PATRICK OWENS, et al.,

Plaintiffs,

v.

RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, et al.,

Defendants.

Civil Action No. 81-2493-6

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the South Carolina State Conference of Branches of the National Association for

the Advancement of Colored People, Inc., and its President, William F. Gibson, et al., plaintiffs in the above referenced matter, hereby appeals to the Supreme Court of the United States from the final judgment entered on May 7, 1982, redistricting the congressional districts in the State of South Carolina.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Thomas I. Atkins
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Attorneys for Plaintiffs

True Copy:
Test:
John W. Williams, Clerk

By [Illegible]
Deputy Clerk

Appendix D—Appellants' Notice of Appeal

CERTIFICATE OF SERVICE

I Margrett Ford, do hereby certify that I have on this 24th day of May, 1982, served a copy of the foregoing Notice of Appeal on all parties of record by depositing a copy of same postage pre-paid in the United States mail and addressed as follows:

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/s/ Margrett Ford, Esq.
Margrett Ford, Esq.

Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-573

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Appellants,

vs.

RICHARD W. RILEY, Governor of the State of South Carolina, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM OR DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Appellants,

vs.

HONORABLE RICHARD W. RILEY, Governor of the State of South Carolina, et al.,

Appellees.

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16.1(a), (c) and (d) of the Rules of the Supreme Court of the United States, the appellees Richard W. Riley, Ramon Schwartz, Jr., Robert J. Sheheen, and James B. Ellisor move the Court to affirm the judgment of the three-judge United States District Court for the District of South Carolina, or, in the alternative, to dismiss the appeal on the grounds that it is manifest that the question on which the decision of the

cause depends is so unsubstantial as not to need further argument, that the appeal was not taken within the time prescribed by the laws of the United States and the rules of this Court, that the case was not docketed within the time prescribed by the rules of this Court, and that the question presented on appeal is not raised or treated in the decree designated in the notice of appeal.

QUESTION PRESENTED ON APPEAL

Whether a congressional redistricting plan, which is a modification of a plan approved by one house of a bicameral state legislative body, ordered to be implemented by a three-judge United States District Court subsequent to the failure of the State to enact a plan must receive pre-clearance pursuant to Section 5 of the Voting Rights Act?

OPINIONS BELOW

The orders of the three-judge United

States District Court for the District of South Carolina, which were entered on March 9, May 7 and June 2, 1982, respectively, are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. A, B, and C.

JURISDICTION

The grounds on which the appellants assert jurisdiction is based are adequately set forth in the appellants' jurisdictional statement. See, Jurisdictional Statement at 2-3. The appellees contend that the Court is without jurisdiction in that the appellants have not taken an appeal in time from the order entered on June 2, 1982. See, Motion to Affirm, etc., at 9-10.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, as amended [42 United States Code, § 1973c], and the Fourteenth and Fifteenth

Amendments of the United States Constitution are referred to in the appellants' jurisdictional statement. See, Jurisdictional Statement, at 3.

STATEMENT OF CASE

The appeal herein, according to the appellants' jurisdictional statement at page 1, is taken from the order of the three-judge United States District Court for the District of South Carolina [Clement F. Haynsworth, Senior United States Circuit Judge, Donald Russell, United States Circuit Judge, and Charles E. Simons, Jr., Chief Judge for the District of South Carolina] entered on June 2, 1982. See, Jurisdictional Statement, App. C at 16a-18a. The order concluded that the congressional redistricting plan previously ordered into effect by the three-judge court in a decree entered on May 7, 1982, which the appellants had

moved to enjoin from implementation, was a "court-ordered" plan and, therefore, not subject to the preclearance provisions of Section 5 of the Voting Rights Act. Id.

The appellants, who were plaintiffs below, commenced this action on October 14, 1981 by the filing of a summons and complaint with the United States District Court for the District of South Carolina. The complaint alleged, among other claims, that the failure of the South Carolina General Assembly to enact a congressional redistricting plan for the six congressional seats allotted South Carolina based upon the 1980 census data violated Article I, Section 2 of the United States Constitution. In the prayer for relief, the court was requested to devise a redistricting plan.

The appellants action was consolidated with a similar action brought by different plaintiffs, who have not appealed. Both

actions were heard by the district court on February 11, 1982.

For many months, the South Carolina Senate and House of Representatives attempted, without success, to enact a congressional redistricting plan based on the 1980 census data. Id., App. A at 2a. Due to irreconcilable differences between the Senate and House, efforts by the General Assembly to enact a redistricting plan proved unsuccessful. Id., App. A at 2a and C at 17a. Several redistricting plans were thereafter submitted to the court by the various plaintiffs, including the appellants herein. Appellees Nancy Stevenson, as the Lieutenant Governor and Presiding Officer of the Senate, and L. Marion Gressette, as the President Pro-Tempore of the Senate and Chairman of the Senate Judiciary Committee, who were defendants below, did not urge the district court to adopt any particular plan, but suggested that it

adhere to State law and policies in arriving at a redistricting plan, especially the policy of adhering to county boundary lines. Appellees Ramon Schwartz, Jr., the Speaker of the South Carolina House, and Robert J. Sheheen, the Chairman of the House Judiciary Committee,[1] endorsed a House-passed 0.28% plan.[2] Id., App. A at 3a-4a, 8a-11a.

On March 9, 1982, the district court entered its per curiam order in the consolidated action. It acknowledged that all parties agreed that because of population

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[1] Appellees Richard W. Riley, as Governor of the State of South Carolina, and James Ellisor, as Executive Director of the State Election Commission did not take a position as to what remedy the court should impose.

[2] The Senate never approved the 0.28% plan. See, Jurisdictional Statement, App. A at 17a.

changes between 1970 and 1980, the court had to adopt a new congressional redistricting plan for South Carolina, and even though the court at first approved a redistricting plan favored by the House, the 0.28% plan, that precise plan never gained final acceptance. Id. at 11a-12a. Instead, the court two months after its initial decree, directed in an order entered on May 7, 1982, that the 0.28% plan be modified. Id., App. B at 13a-15a. It ordered that the line that separated Berkeley County into the First and Sixth Congressional Districts be redrawn. Id. With that change, a number of people were shifted from one congressional district to another and the total population variance increased from 0.28% to 0.295%. Id. Neither house of the South Carolina General Assembly has yet adopted the court-devised 0.295% plan.

The appellants' notice of appeal was filed with the United States District Court

for the District of South Carolina on May 27, 1982. Id., App. D at 19a. This notice states that the appellants appeal from "the final judgment entered on May 7, 1982, redistricting the congressional districts in the State of South Carolina." Id., at 22a. It is understood that the instant appeal was docketed with the Court on or after October 1, 1982.

REASONS FOR GRANTING MOTION

The appellants declare in their jurisdictional statement that they are appealing from the order entered by the district court on June 2, 1982, but no notice of appeal has been filed with respect to that order. Id., at 1, App. D 19a-23a. 28 U.S.C. § 2101; Rule 11.2, supra. The only notice which they presented was filed prior to the entry of the aforementioned order and designates the judgment entered on May 7, 1982, as the

subject of the appeal. Because the appellants have not filed a notice of appeal from the order entered on June 2, 1982, the appeal should be dismissed. Taggart v. New York, 392 U.S. 667 (1968) [per curiam]; Hill v. Chicago and Evanston Railroad Company, 140 U.S. 52 (1891); Credit Company, Ltd. v. Arkansas Central Railway Company, 128 U.S. 258 (1888); Rule 11.3, .4, supra; cf., Gunther v. E.I. DuPont De Nemours and Company, 255 F.2d 710, 717-718 (4th Cir., 1958). Similarly, the appeal should be dismissed in that the sole question presented in the jurisdictional statement was not raised or treated in the order designated in the notice of appeal or the preceding order of March 9, 1982. See, Jurisdictional Statement at 3, App. A, B and D at 22A. Rule 10.2; cf., Martinez v. California, 444 U.S. 277, 281 n. 4 (1980); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 432

n. 12 (1963); Gunther v. E.I. DuPont De Nemours and Company, supra. As indicated in the jurisdictional statement at page 5, the question was not even raised by the appellants until after the entry of the order of May 7, 1982.

The instant appeal was not docketed within the time prescribed by Rule 12.1, supra, or in the extended time set by the Chief Justice in his order dated August 3, 1982. The attempt by the appellants to file a jurisdictional statement which did not conform with Rules 15 and 33, supra, prior to expiration of the extended period could not have effected the docketing of the appeal. Rule 15.2, supra. The appeal, therefore, should be dismissed for the appellants' failure to docket the appeal within the appropriate times. Pittsburg Towing Company v. Mississippi Valley Barge Line Co., 385 U.S. 32, rehearing denied 385 U.S. 995 (1966).

In Connor v. Johnson, 402 U.S. 690, (1971), this Court held that a court-ordered reapportionment plan which has not been adopted by the legislature is not subject to the preclearance requirements of Section 5 of the Voting Rights Act [42 U.S.C. § 1973c]. Cf., Conner v. Waller, 421 U.S. 656 (1975). The preclearance requirements of the Voting Rights Act are applicable only "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people." McDaniel v. Sanchez, 452 U.S. 130 at 153 (1981).

There is no contention made here that the congressional redistricting plan which the district court ordered implemented in the State of South Carolina was ever adopted by the South Carolina General Assembly. Cf., Jurisdictional Statement, App. C at 16a-18a. The 0.295% plan is a

court-fashioned plan and nothing more. No litigant originally conceived it or urged its adoption by the district court. Cf., McDaniel v. Sanchez, supra at 149. And simply because the 0.295% plan is a modification of the 0.28% plan submitted by the House defendants does not make the 0.295% plan any less a plan fashioned by the court. The 0.295% plan came into being only because the district court, unsatisfied with the location of the line in the 0.28% plan that divided Berkeley County [see, Jurisdictional Statement, App. A at 11a-12a], "directed the parties and counsel to redraw the line dividing Berkeley County so as to make it run along precinct lines." Id., App. B at 13a-15a.

The appellants complain, however, that the "court-ordered modifications" in the 0.28% plan that brought about the formulation of the 0.295% plan were "only minor." Id. at 5-6. But any redistricting

plan is necessarily a modification of any other. Every congressional districting plan will differ from another to some degree. While the differences between the 0.28% plan and the 0.295% plan are admittedly small, they are meaningful still. The total population variances differ, 432 people are shifted about, the dividing line in Berkeley County is differently located, and a number of voting precincts are differently affected. Cf., McDaniel v. Sanchez, supra at 135, n. 9. Any one of those factors could well have had legislative significance and prompted debate within the General Assembly. And although the differences between the two plans may be small, there is at least one important difference between them: the 0.28% plan was passed by the House; the 0.295% plan was not.

Even if the 0.295% plan were considered to be the same plan submitted by the House defendants, it was not a plan presented

to the district court by a "covered jurisdiction." Here, the "covered jurisdiction" is the State of South Carolina, not the South Carolina House of Representatives. In South Carolina, the people are governed by a legislature with two houses; and a proposal submitted by only one of them is not the proposal of the State itself.

Furthermore, the court-conceived 0.295% plan clearly does not reflect "the policy choices of the elected representatives of the people." To the extent that the 0.295% plan is considered to be the same plan that the House defendants submitted, it may be said to reflect the policy choices of that one chamber only. The Senate flatly rejected the 0.28% plan. See, Jurisdictional Statement, App. C at 17a. For one thing, it crossed county lines. Id. The 0.28% plan, therefore, cannot be said to reflect the policy

choices of the South Carolina General Assembly as a whole; neither, then, of course, can the 0.295% plan.

As noted by the district court, the 0.295% "plan imposed by the Court was never adopted by the South Carolina legislature." Id at 17a. That fact sharply distinguishes the instant case from McDaniel v. Sanchez, supra at 135, where the County Commissioners Court "officially adopted" a reapportionment plan which it submitted to the Court.[3/] In short, McDaniel does not in any way lend support to the appellants' assertion that preclearance is required here. There is simply no authority for the proposition that a court-ordered reapportionment plan,

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[3/] This case also differs from Hughley v. Adams, 667 F.2d 25 (11th Cir., 1982) where a defendant school board designed the redistricting plan which the district court adopted for the election of school board members.

particularly one which differs from any plan submitted to the court by a party to the litigation, must be submitted to the Justice Department for Section 5 pre-clearance when the plan was not submitted by a "covered jurisdiction" and does not reflect the policy choices of the elected representatives of the people.

The appellants based the substantiality of the question herein on their position that the district court's order holding that preclearance is unnecessary in this instance poses a threat to the continued viability of Section 5. That fear is unfounded because the district court's order falls within the exemption recognized by this Court in Conner v. Johnson, supra, for court-ordered plans and spelled out in Regulation 51.16 of the Procedures for the Administration of Section 5 of the Voting Rights Act of

1965.[4/] The district court's order poses no more of a threat to Section 5 than did the district court's order in Connor.

Finally, even assuming the appellants are correct and that Section 5 preclearance of the Court's plan is required, an injunction against the November 2, 1982, congressional elections would be unwarranted at this late date. This Court has repeatedly held or recognized that elections may be held even in the face of Section 5 objections by the Attorney General, provided the plan is recognized as temporary. Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971); see also, Horry County v. United States, 449 F.Supp. 990 (D.D.C. 1978);

[4/] 28 C.F.R. 51.16 provides in part:

> Changes affecting voting that are specifically ordered by a Federal Court ... are not subject to the preclearance requirement of Section 5. ...

Terrazas v. Clements, 537 F.Supp. 514 (N.D.Tex. 1982). This Court recently has even permitted the temporary implementation of a plan which a district court lacked authority to make. Upham v. Seamon, 71 L.Ed2d 725 (1982). If elections may be held pursuant to a demonstrably objectionable or invalid plan, then a fortiori they should be permitted when the plan has not been precleared and hence is not known to be necessarily objectionable.

CONCLUSION

The aforementioned appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina or, in the alternative, to dismiss the

appeal as not being taken in time, as not being docketed in time, and as presenting for review a question not raised or treated in the decree which is designated in the notice of appeal. In any event, no injunction should issue enjoining the upcoming congressional elections.

Respectfully submitted,

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Deputy Attorney General

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